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No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, Secretary, Florida Department of Environmental Protection, and TERENCE COULLIETTE,
Petitioners,

v.

T.A. WYNER and GEORGE SIMON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether plaintiffs who file suit alleging a violation of their constitutional rights are "prevailing parties" for purposes of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, when they obtain preliminary injunctive relief but ultimately lose on the merits.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include county and municipal governments and officials throughout the United States.[1] *Amici*'s members are frequently sued for the "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983.[2] The Civil Rights Attorney's Fees Awards Act provides that in section 1983 actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." *Id.* § 1988(b).

The liability for attorney's fees under section 1988 has significant implications for budgeting and delivery of services by state and local governments. Funds that must be allocated to the payment of attorney's fees are unavailable for other public purposes. *Amici* fully acknowledge their obligation to pay attorney's fees under section 1988 for deprivations of civil rights. In this case, however, the district court concluded that there had been no violation of respondents' rights, and yet petitioners were held liable for attorney's fees because the district court, in an expedited preliminary proceeding, issued interlocutory injunctive relief. A rule that permits civil rights plaintiffs to recover attorney's fees even in cases that prove meritless can only produce equally meritless litigation, burdening local governments with both unwarranted liability for attorney's fees and the costs of defending

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

[2] In the 12-month period ending March 31, 2006, 31,240 civil rights cases were filed in the federal courts in which the United States was neither a plaintiff nor a defendant. *See* Office of Judges Programs, Administrative Office of the U.S. Courts, Federal Judicial Statistics (March 31, 2006), tbl. C-2.

such litigation. Accordingly, *amici* ask this Court to confine section 1988 liability to its proper scope—cases in which the civil rights plaintiff obtains a judgment that her rights have been violated.

STATEMENT OF THE CASE

John D. MacArthur Beach State Park is a public park of the State of Florida that includes nature trails and a beach. Pet. App. 11a, 23a-24a. A portion of the park was once considered a "clothing optional" beach before it came under the State's control. *Id.* at 11a, 24a. Applicable state regulations, however, prohibit nudity at state parks: Florida Administrative Code Rule 62D-2.014(7)(b) provides that "[i]n every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering." *Id.* at 27a-28a. In addition, applicable regulations authorize park management to regulate the time, place, and manner of expressive activities in the parks: Florida Administrative Code Rule 62D-2.014(18) provides:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

Pet. App. 26a.

In 1990, respondent T.A. Wyner ("Wyner"), as part of a protest against the State's restrictions on nudity at the beach, appeared on the beach while clothed only in an opaque copy of the Bill of Rights. Pet. App. 11a, 24a-25a. Wyner was arrested and charged with disorderly conduct, but the charges were later dropped. *Id.* at 11a, 25a. Wyner filed an action seeking damages for a violation of her civil rights and obtained a judgment in her favor, but that award was later vacated on appeal on grounds of qualified immunity. *Id.* at 11a; *see DeWald v. Wyner*, 674 So. 2d 836 (Fla. Dist. Ct. App. 1996).

In 1991, Wyner directed and performed in the park a play entitled "MacArthur: The Man and the Beach," which included nude scenes. Pet. App. 11a, 25a. She and others were arrested, but the charges were subsequently dropped, and another damages action ensued. *Id.* That litigation was settled by the parties' agreement that when Wyner wished to perform the play at the park, she would give the park's manager at least fourteen days notice along with an estimate of the number of participants and audience members, performances would take place at least 100 yards from the nearest boardwalk, and Wyner would place a cloth screen around the area in which the play was to be performed. *Id.* at 11a-12a, 25a-26a; J.A. 22-23.

At least twice following that settlement, Wyner performed the play in the park but failed to utilize the screen. Pet. App. 12a, 26a. As Wyner acknowledged in her testimony at the injunction hearing in this case, when she performed the play in 1996 she did so with no screening and with nudity. J.A. 47-48. She performed the play again in 2000, but when park personnel erected a screen the nude performers again presented the play outside of the screen. J.A. 53-55.

In mid-January 2003, Wyner contacted petitioner Terence Coulliette, the park's manager, and notified him that she planned to produce a temporary art installation consisting of

nude bodies arrayed in the shape of a peace symbol on February 14. Pet. App. 27a. Coulliette requested written notice, and on January 29, Wyner gave notice by email. *Id.* at 12a-13a, 27a. The email stated that the event would last approximately three hours, the installation would be presented during approximately 90 minutes, and that Wyner estimated that there would be no more than 50 participants. *Id.* at 13a, 29a-30a; J.A. 29-30. Couilliette submitted Wyner's request to the Bureau Chief of the Parks District "for his review, consideration, and input." J.A. 26. Thereafter, on February 6, Coulliette sent Wyner a letter stating that the performance would be permitted but that the participants would have to comply with the park regulation prohibiting nudity. *Id.* at 29-30.

On February 12, 2003, Wyner and respondent George Simon filed suit against Park Manager Coulliette and David B. Struhs, who was then the Secretary of the Florida Department of Environmental Protection, alleging that the anti-nudity and time, place, and manner regulations at the park violated the First Amendment and therefore effected an actionable deprivation of rights under 42 U.S.C. § 1983. J.A. 10-20.[3] Respondents simultaneously sought a temporary restraining order and/or a preliminary injunction on the ground that the park's refusal to allow the planned February 14 nude peace event violated their First Amendment rights. *Id.* at 32-34.[4]

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[3] The complaint also contained a count asserting a right to nude protest under the Florida Constitution. J.A. 19. Respondents eventually agreed to the dismissal of this count. J.A. 98-99.

[4] Subsequent to the time that certiorari was granted by this Court, Secretary Struhs was succeeded in office by Michael W. Sole, who has been substituted as a petitioner under this Court's Rule 35.3. Throughout this brief, we will refer to the original defendants named in the complaint as "petitioners," even though Secretary Sole did not technically become a petitioner until after this case arrived at this Court.

The district court held an injunction hearing on respondents' motion for injunctive relief the next day, on what the court acknowledged was "exceedingly short notice." J.A. 37. Petitioners' counsel and witness were unable to attend the hearing, and participated by telephone. J.A. 36. Petitioners' counsel added that they had received "short notice . . . and we don't know much of what is going on, but, as far as I can tell, there probably aren't any disputed facts." *Id.* at 38. Petitioners' counsel did not receive copies of respondents' newly-introduced exhibits and had no notice of those exhibits other than listening as their contents were read over the phone. *Id.* at 52-56. Counsel for petitioners objected on the ground that respondents' counsel "hasn't shown us any of these exhibits in advance of the hearing so we could review them," *id.* at 55, but the district court overruled the objection "because of the time constraints of a preliminary injunction or temporary restraining order." *Id.* at 56.

At the conclusion of the hearing, the district court expressed concern about the discretion exercised by the park manager, J.A. 93-94, and added that the use of a screen and warning signs would constitute "alternatives that would be far less restrictive and could still meet the government interests, which would appear to be to protect beach-goers from being exposed to nudity . . . ." *Id.* at 94. The court added, "It bothers me, I think there are a lot of issues in this case, and I don't like to try to decide issues on this quick a basis, but I do feel like this meets the test of the injunction." *Id.* at 95.

In its written order granting the preliminary injunction handed down two weeks after the hearing, the district court applied a four-part test governing the issuance of such relief. The court inquired whether respondents had demonstrated "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the

opposing party; and (4) that, if issued, the injunction would not be adverse to the public interest." Pet. App. 14a. The court concluded that respondents faced irreparable injury absent injunctive relief, that respondents' injuries would outweigh any injury to petitioners from issuance of an injunction, and that the public interest favored the issuance of injunctive relief to protect First Amendment rights. *Id.* at 14a-15a.

On the likelihood of success on the merits, despite respondents' claim that the park manager exercised effectively unchecked discretion over expressive activities in the park under the time, place, and manner regulation and therefore was free to engage in discrimination on the basis of the content or viewpoint of speech, the court was willing to assume that the park's policies were content-neutral. Pet. App. 16a-17a. The district court also concluded that the prohibition on nudity advanced the legitimate government interest in protecting unwilling park users from exposure to nudity. *Id.* at 17a-18a. The court ruled, however, that the prohibition was not adequately tailored because the alternatives utilized in the prior settlement could adequately serve these governmental interests. *Id.* at 18a. The court issued injunctive relief against enforcement of the anti-nudity rule during the planned event on February 14, while permitting use of the measures utilized in the prior settlement. *Id.* at 19a-20a.

On February 14 respondents conducted their nude peace-symbol installation at the beach. They did not, however, remain behind the cloth screen provided. Pet. App. 4a. *See also id.* ("a fair reading of the record shows that plaintiffs had no intention of remaining behind a cloth screen or other barriers during future nude expressive works").

On January 28, 2004, the district court, ruling on the parties' cross-motions for summary judgment, concluded that the park's anti-nudity and time, place, and manner regulations

were valid content-neutral regulations that were narrowly tailored to advance substantial government interests. Pet. App. 36a-46a. The court entered judgment against respondents and in favor of petitioners. *Id.* at 46a; J.A. 145.

On February 27, 2004, respondents filed a motion for attorney's fees and taxable costs. J.A. 6. On August 16, 2004, the district court ruled that because respondents had obtained preliminary relief on February 13, 2003, they were "prevailing parties" entitled to recover their attorney's fees under section 1988 for work performed on the preliminary injunction litigation. Opp. App. 3a-4a.[5] The court added, however, that because final judgment was entered in favor of petitioners, they were entitled to costs. *Id.* at 10a. Accordingly, the district court entered judgment in favor of respondents for attorney's fees of $25,924.50, and also granted petitioners' motion to tax costs. *Id.* at 12a-13a.

Petitioners appealed the judgment against them for attorney's fees, and in a brief unsigned opinion, the court of appeals affirmed. Pet. App. 5a. On the question whether respondents were prevailing parties within the meaning of the Civil Rights Attorney's Fees Awards Act, the court wrote: "To qualify as a prevailing party, the plaintiff must obtain the primary relief sought in the case." *Id.* at 2a. The court then concluded that "the preliminary injunction in this case decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants—and thus was on the merits." *Id.* at 2a-3a. The court added that because the district court had granted summary judgment against the plaintiffs based "on new facts presented at the summary judgment hearing which demonstrated that the less restrictive alternative was not sufficient," the preliminary injunction was not "based on a mistake of law." *Id.* at 5a.

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[5] The district court's "Omnibus Order" containing its rulings on fees and costs is an appendix to respondents' brief in opposition to the petition for certiorari. Citations to this order are abbreviated "Opp. App."

SUMMARY OF ARGUMENT

In an action under section 1983, the Civil Rights Attorney's Fees Awards Act permits a district court to award attorney's fees to a "prevailing party." 42 U.S.C. § 1988. A party who ultimately loses her case, even if she obtained preliminary injunctive relief, is not a prevailing party within the meaning of section 1988.

In common parlance, one prevails—in litigation or any other type of contest—by achieving success that is lasting. No one prevails by means of a transient victory that is later undone. The precedents construing section 1988 are based on just this recognition—it is settled that a prevailing party must succeed on the merits of her claim, and not merely in preliminary skirmishing, even if it results in a transient victory in the form of a preliminary injunction. Preliminary injunctions, after all, are not rulings on the merits, but rather are based on the district court's prediction as to the plaintiff's likelihood of success on the merits—a prediction that proved in this case to be erroneous. At the conclusion of this litigation, respondents were losers, not winners. The district court entered judgment against respondents, and rejected their attacks on the park regulations at issue. A litigant who ultimately leaves the courthouse empty-handed is not a prevailing party, regardless of whatever success that litigant may have enjoyed in the earlier stages of the litigation.

Accordingly, respondents were not prevailing parties in this case. Their only victory in this case was a temporary one; it had disappeared within 72 hours of the time that they had filed suit, when the preliminary injunction, by its terms, expired. Moreover, that preliminary victory was not on the merits of this lawsuit; it instead was under the equitable test that governs preliminary injunctive relief, and reflected only the district court's preliminary assessment of the merits. At the end of the litigation, the district court upheld the park regulations that respondents had contested; and the preclusive

force of its judgment will prevent respondents from mounting any future challenges to those regulations. Respondents were not the prevailing parties in this litigation.

It is equally settled that section 1988 should be construed in light of the congressional purpose to provide an incentive for attorneys to bring meritorious civil rights litigation. This case was not meritorious. The First Amendment does not grant anyone a right to go naked at a public beach, even as part of a protest. The park's anti-nudity regulations were perfectly constitutional; indeed, their validity is no longer at issue in this litigation.

States and local governments are properly obliged to pay attorney's fees when there has been a violation of a plaintiff's civil rights, but in this case respondents' rights were never violated. Nothing in section 1988 or the cases construing it suggests that plaintiffs should be permitted to recover attorney's fees in a case in which they establish no violation of their civil rights, and obtain no relief on the merits. If this Court were to hold, however, that even litigation that fails on the merits can give rise to attorney's fee liability if the plaintiff can obtain preliminary relief, it will create a perverse incentive for plaintiffs to bring nonmeritorious cases. Not only is preliminary injunctive relief is easier to obtain than a final judgment on the merits, but the prospect of mounting legal fees will also encourage governmental defendants to settle cases quickly rather than paying escalating attorney's fee awards for preliminary relief. Such a result is utterly at odds with the very statute under which respondents seek to recover attorney's fees.

ARGUMENT

Despite a preliminary victory, respondents ultimately failed to establish any violation of their civil rights. The district court awarded respondents a preliminary injunction, but only by applying the equitable standards governing such requests.

When the district court subsequently reached the merits, it upheld the regulations that respondents had challenged; and it never concluded that respondents' rights were violated. There is no basis for construing the Civil Rights Attorney's Fees Awards Act to require state and local governments to divert scarce public resources to the payment of plaintiffs' attorney's fees in cases in which there has been no violation of the plaintiffs' civil rights. The judgment of the court of appeals should be reversed.

I. A PLAINTIFF WHO OBTAINS PRELIMINARY INJUNCTIVE RELIEF BUT WHO LATER LOSES ON THE MERITS IS NOT A PREVAILING PARTY.

The Civil Rights Attorney's Fees Awards Act provides that in actions under section 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988(b). Not every favorable ruling during the course of litigation, however, confers prevailing party status. Instead, "[t]he touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship between the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989) (emphasis supplied). *Accord Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604 & n.6 (2001).[6]

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[6] *Buckhannon* was decided under the provisions of the Fair Housing Act Amendments of 1988 and the Americans with Disabilities Act that permit a prevailing party to recover attorney's fees. *See*.532 U.S. at 601. Nevertheless, this Court has held that all of the various statutes that permit prevailing parties to recover attorney's fees in terms that track section

The preliminary injunction issued in this case was insufficient to confer prevailing party status on respondents. It was not an adjudication of the merits of this lawsuit; indeed, when the district court ultimately reached the merits, it ruled against respondents, not least because the court had "a hard time understanding . . . that there's some First Amendment right to nude expression in state parks." J.A. 103. On the merits, respondents were losers, not winners. The preliminary injunction was accordingly not the type of "material" alteration in the legal relationship that Congress intended to confer prevailing party status on a civil rights plaintiff.

A. A Plaintiff Does Not Prevail By Obtaining Only Interlocutory Relief.

In common parlance, the term "prevailing" refers to the eventual outcome of a contest or dispute, not to a preliminary or tentative victory. No one thinks that Germany or Japan "prevailed" in World War II because they won the early battles.[7] The same is true of parties that win only the preliminary skirmishes in litigation—unless they ultimately succeed in obtaining a favorable judgment, they have not prevailed. As this Court wrote in *Buckhannon*, quoting the leading legal dictionary, "Black's Law Dictionary . . . defines 'prevailing party' as '[a] party in whose favor judgment is rendered, regardless of the amount of damages awarded . . . . Also termed *successful* party." 532 U.S. at 603 (emphasis in original) (quoting Black's Law Dictionary 1145 (7th ed. 1999)). Thus, as the Court explained in *Hewitt v. Helms*, 482

1988 should be construed consistently. *See id.* at 603 n.4 (citing *Hensley v. Eckerhart*, 462 U.S. 424, 433 n.7 (1983)).

[7] Justice Ginsburg used a similar example in *Buckhannon* when she observed: "Western democracies, for instance, 'prevailed' in the Cold War even though the Soviet Union never formally surrendered." 532 U.S. at 633 (dissenting opinion). This was the case even though Western democracies experienced any number of setbacks during the course of the Cold War.

U.S. 755 (1987), "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760. *Accord, e.g.*, *Buckhannon*, 532 U.S. at 603; *Farrar v. Hobby*, 506 U.S. 103, 111 (1992); *Texas State Teachers Association*, 489 U.S. at 792-93; *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam).[8] Accordingly, in law as in common parlance, the term "prevailing" refers to ultimate success, and not a preliminary or interlocutory victory. Indeed, this Court has construed the phrase "prevailing party" within the meaning of section 1988 to exclude preliminary victories that provide no assurance of a lasting benefit that will endure until the time the litigation ends.

In *Hanrahan v. Hampton*, for example, the district court had directed verdicts for the defendants in a civil rights action, but the court of appeals reversed and remanded for a new trial, and also awarded attorney's fees under section 1988 for the successful appeal. *See* 446 U.S. at 754-55. This Court, however, vacated the fee award, holding that fees can be awarded "only to a party who has established his entitlement to some relief on the merits of his claims . . . ." *Id.* at 757. The Court added that favorable "procedural or evidentiary rulings . . . may affect the disposition on the merits, but were themselves not matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party under § 1988." *Id.* at 758. To similar effect is *Sullivan v. Hudson*, 490 U.S. 877 (1989), in which the Court held that a litigant is not a "prevailing party" even when she obtains a

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[8] The court of appeals, citing its decision in *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987), thought that prevailing party status turned on whether the plaintiff "obtain[ed] the primary relief sought in the case." Pet. App. 2a. The district court used the same test. *See id.* at 45a. In *Texas State Teachers Association*, however, this Court specifically rejected a test asking whether the plaintiff succeeded on the "central issue" in the litigation. *See* 489 U.S. at 790-91.

ruling that sets aside an administrative denial of her application for disability benefits because "where a court's remand to the agency for further proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain 'prevailing party' status . . . until after the result of the administrative proceeding is known." *Id.* at 886.[9]

Equally instructive is *Hewitt v. Helms*. In that case, the court of appeals held that a prisoner hearing committee's reliance on an uncorroborated report from an undisclosed informant to convict a prisoner of striking a correctional officer was unconstitutional, but the defendants later obtained summary judgment on grounds of qualified immunity. *See* 482 U.S. at 757-59. The court of appeals nevertheless held that the prisoner was entitled to recover attorney's fees because he had prevailed by obtaining a holding that his constitutional rights had been violated. *See id.* at 759. This Court reversed, holding that that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760 (citing *Hanrahan*, 446 U.S. at 757). The Court "conclude[d] that a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'

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[9] *Sullivan v. Hudson* was decided under the attorney's-fee provision of the Equal Access to Justice Act ("EAJA"), which authorizes an award of attorney's fees and other expenses against the United States "to a prevailing party . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A), *quoted in* 490 U.S. at 883-84. As we explain above, all statutes utilizing the prevailing party standard for awarding fees should be construed consistently. *See* note 6, *supra*. Indeed, in *Hudson* the Court cited decisions construing section 1988 to support its construction of the EAJA. *See* 490 U.S. at 886-87 (noting that "[t]he situation [in *Hudson*] is for all intents and purposes identical to that. . . in *Hanrahan*").

Any other result strains both the statutory language and common sense." *Id.* at 763.

Finally, in *Texas State Teachers Association*, the Court rejected a test for prevailing party status that turned on whether the plaintiff had succeeded on a significant or central issue in the case. The Court reasoned that this approach would permit a plaintiff to obtain an interlocutory fee award following what seemed to be a significant interlocutory victory even though its significance might have eroded by the end of the case. "Congress," this Court held, "cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees . . . ." 489 U.S. at 791.[10]

Thus, "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Farrar*, 509 U.S. at 109 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). To be sure, no great quantum of relief on the merits is required for prevailing party status. In *Farrar*, for example, the Court held that an award of nominal damages made the plaintiffs prevailing parties because it created a legal obligation to pay a judgment that did not

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[10] It was in this context that the Court added: "A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendent lite* or at the conclusion of the litigation." 489 U.S. at 791. In context, it is plain that the Court's statement about relief *pendent lite* is not referring to preliminary injunctive relief, but rather to an interlocutory ruling that provides some of the ultimate relief sought on the merits. Indeed, in *Texas State Teachers Association*, the plaintiffs obtained a judgment invalidating a school district's policies forbidding teachers to discuss employee organizations during the school day or to use internal mail and other facilities to discuss employee organizations. *See id.* at 786-87. It was because the judgment provided the plaintiffs with a permanent alteration in school policies that this Court ruled that the plaintiffs were prevailing parties. *See id.* at 793.

previously exist. *See id.* at 113-14.[11] Similarly, a judicially enforceable consent decree, even unaccompanied by an admission of liability, "create[s] the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Association*, 489 U.S. at 792-93). Still, both an award of nominal damages and a consent decree provide some measure of relief to the plaintiff that lasts until the end of the litigation. There is no authority, in contrast, to support the view that a "prevailing party" includes "a litigant who left the courthouse emptyhanded." *Id.* at 614 (Scalia, J., concurring).

B. The Preliminary Injunction Was Not Relief On The Merits Of Respondents' Claim.

Although prevailing party status requires that a plaintiff achieve a victory on the merits, the district court never reached the merits when ruling on respondents' motion for a preliminary injunction. Instead, the district court's evaluation of the merits was preliminary—it considered only whether there was "a substantial likelihood of success on the merits," Pet. App. 14a, as well as the equitable considerations involving the balance of hardships and the public interest that govern issuance of preliminary injunctive relief. *Id.* Nevertheless, the court of appeals concluded that "the preliminary injunction in this case decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants—and thus was on the merits." *Id.* at 2a-3a. That holding, however, is inconsistent with the district court's contemporaneous statement that it had considered only

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[11] In *Farrar*, the Court added that it will generally be inappropriate to award attorney's fees in a case in which the plaintiff recovers only nominal damages because no fees are ordinarily the only "reasonable" award in a case in which the plaintiff fails to convince the trier of fact that he experienced any compensable damages. *See* 506 U.S. at 114-16.

respondents' likelihood of success on the merits when it granted the preliminary injunction. It is likewise inconsistent with this Court's precedents.

In *University of Texas v. Camenisch*, 451 U.S. 390 (1981), Camenisch, a deaf student, obtained a preliminary injunction requiring the University to pay for a sign-language interpreter to assist him with his studies in an action under the Rehabilitation Act of 1973. *See id.* at 392-93. After Camenisch graduated, the University contended that the propriety of the injunction had become moot. This Court stated that if the injunction had decided the merits of Camenisch's claim, the injunction's propriety would not be moot because the parties still disputed who should bear the cost of the interpreter. *See id.* at 393-94. The Court nevertheless held that the held that although the "likelihood of success on the merits was one of the factors" that the lower courts had considered when Camenisch obtained preliminary injunctive relief, that did not mean that the injunction was "tantamount to decisions on the underlying merits . . . ." *Id.* at 394. The Court explained:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Id. at 395 (citations omitted).

Accordingly, a decision to grant a preliminary injunction "may not be considered a 'final judicial decision based on the actual merits of the controversy.'" *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716 (1981) (per curiam)

(quoting *Camenisch*, 451 U.S. at 396).[12] Indeed, in *Bellanca*, the Court added that when it reviews a preliminary injunction in a First Amendment case, its review is limited "to whether the District Court abused its discretion in concluding that plaintiffs were likely to prevail on the merits of their claims, *not whether the ordinance actually violated the First Amendment.*" *Id.* (emphasis added).[13]

It follows that the preliminary injunction issued in this case is not properly characterized as a judgment on the merits of respondents' First Amendment claims. It was issued one day after suit was filed; on short notice; petitioners had little opportunity to prepare a defense, no opportunity to engage in discovery, and had not even seen the exhibits introduced at the hearing; petitioners' counsel and witness were not able to attend the hearing except by telephone; and the preliminary injunction did no more than preserve the status quo by requiring petitioners to offer the accommodations that they had volunteered to Wyner in the past. That decision, accordingly, has none of the hallmarks of a judgment on the merits. Indeed, the district court itself observed, even as it granted preliminary relief: "It bothers me, I think there are a lot of issues in this case, and I don't like to try to decide issues on

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[12] In *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court added that it is of no consequence whether the district court frames its ruling granting a preliminary injunction as based on the merits or based on the equitable factors governing preliminary relief, since "any conclusions reached at the preliminary injunction stage are subject to revision . . . ." *Id.* at 317.

[13] In *Bellanca*, the Court discussed *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), in which the Court described its review of a preliminary injunction as limited to whether "the District Court abused its discretion by granting preliminary relief" under the First Amendment. *Id.* at 933. The *Doran* Court added: "This is the extent of our appellate inquiry, and we therefore 'intimate no view as to the ultimate merits of [respondents'] contentions.'" *Id.* (quoting *Brown v. Choate*, 411 U.S. 452, 457 (1973) (brackets in original)).

this quick a basis, but I do feel like this meets the test of the injunction." J.A. 95. Thus, the district court's ruling was based on its consideration of whether respondents "were *likely* to prevail on the merits of their claim, not whether the [challenged policies] actually violated the First Amendment." *Bellanca*, 451 U.S. at 716 (emphasis in original).[14] The district court's assessment of the merits was preliminary and predictive; there was no actual ruling on the merits at the time that the preliminary injunction issued.

Congress surely could not have intended that prevailing party status turn on a hurried and tentative ruling on inade-

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[14] Although it has long been settled that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)), there is some disagreement in the circuits on the precise role that merits play in evaluating a request for preliminary injunctive relief. *See* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 Rev. Litig. 495, 507-30 (2003). Ten circuits use a balancing approach in which a weaker showing on the merits can support a preliminary injunction if accompanied by a strong showing on the equities. *See Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002); *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998); *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998); *Boucher v. School Board of the School District of Greenfield*, 134 F.3d 821, 824 (7th Cir. 1998); *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir.), *cert. denied*, 522 U.S. 810 (1997); *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6 (2d Cir. 1996); *Walmer v. United States Dept. of Defense*, 52 F.3d 851, 854 (10th Cir. 1995); *Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994); *Standard Havens Products., Inc. v. Gencor Industries., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990), *cert. denied*, 506 U.S. 817 (1992); *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975). The remaining circuits seem to treat a finding of a likelihood of success on the merits as a necessary requirement for a preliminary injunction. *See Walgreen Co. v. Hood*, 275 F.3d 475, 477-78 (5th Cir. 2001); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001); *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993).

quate notice and an incomplete record as in this case. To be sure, the legislative history of section 1988 indicates that Congress envisioned awards of attorney's fees for some types of interlocutory victories. *See* S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912; H.R. Rep. No. 94-1558 at 7-8 (1976). In *Hanrahan v. Hampton*, however, the Court surveyed this legislative history, and concluded: "[I]t seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims . . . ." 446 U.S. at 757.

Indeed, nothing in the legislative history supplies the slightest support for the view that a preliminary injunction could make a civil rights plaintiff a "prevailing party." The legislative history plainly indicates that an adjudication of liability or a judicially enforceable consent decree can confer prevailing party status. *See Buckhannon*, 532 U.S. at 607 & n.9. Some Members of the Court have concluded that the legislative history goes so far as to suggest that a defendant's voluntary decision to discontinue a challenged practice in the absence of formal judicial relief might be sufficient to confer prevailing party status. *See id.* at 637 (Ginsburg, J., dissenting). A majority of the Court, however, thought the legislative history insufficiently clear to overcome the settled rule that the term "prevailing party" requires relief on the merits. *See id.* at 607. But whatever the correct understanding of the legislative intent on this point, there is no support in the legislative history for the view that plaintiffs who ultimately have a final judgment entered against them can nevertheless qualify as prevailing parties. To the contrary, as we explain above, it is settled that "liability on the merits and responsibility for fees go hand in hand; *where a defendant has not been prevailed against, either because of legal immunity or on the merits*, § 1988 does not authorize a fee award against that defendant." *Farrar*, 509 U.S. 109 (quoting *Kentucky v. Graham*, 473 U.S. at 165) (emphasis added).

Accordingly, respondents were not prevailing parties in this litigation. Respondents enjoyed a temporary victory that expired by its terms on February 14, 2003, and then ultimately lost the case on the merits. Respondents were losers, not winners; final judgment was entered against them. Moreover, under the doctrine if res judicata, the district court's final judgment bars respondents or their privies from relitigating any issues that were or could have been raised in this case. *See, e.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981). Thus, the judgment in this case not only upholds the regulations and park policies that respondents challenged, but it forecloses future challenges. "That is not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 760 (citing *Hanrahan*, 446 U.S. at 758-59).

To be sure, for a three-hour period on February 14, 2003, the preliminary injunction changed the legal relationship between the parties. But this temporary and ephemeral alteration in the legal relationship between the parties did not confer prevailing party status. Even though the preliminary injunction was based in part on the district court's assessment of respondents' probability of success on the merits, that assessment was the kind of transitory victory that will not suffice to confer prevailing party status because it does not amount to relief on the merits, as we explain above. Indeed, a transitory alteration in the legal relationship between the parties based on a preliminary assessment of the merits that proves to be inaccurate could not possibly be sufficient to confer prevailing party status; if it were, even a plaintiff who obtained a preliminary injunction later reversed on appeal would be a "prevailing party." This Court, however, has already rejected this construction of "prevailing party," holding that when an injunction is set aside on appeal, a fee award for obtaining it must be set aside as well. *See Bray*

v. Alexandria Women's Health Clinic, 506 U.S. 263, 285 (1993).[15]

In fact, the district court recognized which side prevailed on the merits in this litigation, and it was not respondents. Even as it awarded attorney's fees to respondents for obtaining the preliminary injunction, it simultaneously ruled that petitioners were entitled to costs because "final judgment was entered in [their] favor . . . ." Opp. App. 10a. A litigant is entitled to recover its costs, however, only when it is "the prevailing party." Fed. R. Civ. P. 54(d). *See, e.g., Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988) (per curiam). Thus, the district court correctly understood that an interlocutory victory cannot make a litigant a "prevailing party" in a case that she ultimately loses on the merits. The bizarre result here, however, is that although section 1988 provides for "a reasonable attorney's fee as part of the costs," 42 U.S.C. § 1988(b), an attorney's fee was awarded to respondents even though costs were awarded to petitioners. Such an approach is inconsistent with the text of section 1988, which indicates that just as liability and fees go hand-in-hand, the award of fees and costs should go hand-in-hand.[16]

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[15] Every circuit to consider the question has rejected a claim that a plaintiff can be a prevailing party by obtaining the benefits of an injunctive decree prior to the time that it is set aside on appeal from the judgment issuing the injunction. *See, e.g., Palmer v. City of Chicago*, 806 F.2d 1316, 1321-22 (7th Cir. 1986); *Doe v. Busbee*, 684 F.2d 1375, 1381-83 (11th Cir. 1982).

[16] One could perhaps reconcile the district court's costs and fee rulings by taking the view that prevailing party status should be determined by reference to each phase of the litigation, permitting a plaintiff to be treated as a prevailing party for purposes of the preliminary injunction hearing even though the defendant proved to be the prevailing party on the merits. As we explain above, however, this Court has rejected such a construction of section 1988, requiring instead that a plaintiff prevail on the merits. The district court's costs award, in turn, demonstrates that even that court understood that petitioners had prevailed on the merits of this litigation.

Had respondents wished to seek a judgment on the merits prior to the planned February 14 protest, despite the limited time available, they could have done so. A court may order trial on the merits to be consolidated with the hearing on a motion for a preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2). The merits of respondents' asserted First Amendment right to engage in the February 14 nude protest would have been an appropriate candidate for consolidation, given the press of time and respondents' theory that they had a right under the First Amendment to engage in the nude February 14 exhibition on a public beach. Respondents, however, sought only preliminary relief in their February 12 motion instead of requesting a judgment on the merits under Rule 65. Nor did the district court enter a consolidation order in accordance with the requirement that the parties "receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Camenisch*, 451 U.S. at 395 (brackets in original) (quoting *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)). *Accord* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure (Civil)* § 2950 (rev. 2006).

Respondents' decision not to seek relief on the merits in their February 12 motion is understandable; presumably they did not wish to satisfy the more stringent standard for relief on the merits requiring a plaintiff to establish "actual success on the merits instead of a likelihood of success." Pet. App. 34a (quoting *Siegel v. Lepore*, 234 F.3d 1163, 1213 (11th Cir. 2000)). *Accord, e.g., Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). Nevertheless, there is surely no unfairness in holding respondents to their tactical decision to reserve the merits of their First Amendment claim for the summary judgment stage of this litigation. If respondents wanted to obtain attorney's fees based on their request

for emergency relief permitting the February 14 event, they were required to prevail on the merits, as we explain above. Respondents, however, made no effort to obtain a ruling on the merits at the February 13 injunction hearing.

Moreover, had respondents asked the district court to consider the merits of their asserted First Amendment right at the February 13 injunction hearing, the parties would have been on fair notice that attorney's fee liability was at stake. Under those circumstances, respondents' victory could well have made them prevailing parties within the meaning of section 1988.[17] Respondents, however, did not choose that course. Under these circumstances, respondents' preliminary success in a case that they ultimately lost does not make them "prevailing parties" entitled to an award of attorney's fees.

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[17] There is some question about whether an injunction issued on the merits but under circumstances in which there is no meaningful opportunity for appellate review because it concerns a short-lived event and will become moot once the event concludes is a sufficient basis on which to confer prevailing party status. *See Kay v. David Douglas School District No. 40*, 484 U.S. 1032, 1032-34 (1988) (White, J., dissenting from denial of certiorari); *Alioto v. Williams*, 450 U.S. 1012, 1012-13 (1981) (Rehnquist, J., dissenting from denial of certiorari). Nevertheless, every circuit to reach the question has concluded that the fact that injunctive relief becomes moot before it can be reviewed on appeal does not itself defeat prevailing party status. *See, e.g., Murphy v. Fort Worth Independent School District*, 334 F.3d 470, 471 (5th Cir. 2003) (per curiam); *Richard S. v. Department of Developmental Services of California*, 317 F.3d 1080, 1088-89 (9th Cir. 2003); *Young v. City of Chicago*, 202 F.3d 1000, 1000-01 (7th Cir. 2000) (per curiam); *National Black Police Association v. District of Columbia Board of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999); *Haley v. Pataki*, 106 F.3d 478, 483-84 (2d Cir. 1997); *Dahlem v. Board of Education of Denver Public Schools*, 901 F.2d 1508, 1514-15 (10th Cir. 1990); *Bishop v. Committee on Professional Ethics of the Iowa State Bar Association*, 686 F.2d 1278, 1290-91 (8th Cir. 1982). This Court need not decide that question in this case, however, since the injunctive relief issued here was not a victory on the merits and therefore does not confer prevailing party status, as we explain above.

II. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT IS NOT PROPERLY CONSTRUED TO AWARD ATTORNEY'S FEES TO PLAINTIFFS WHO LOSE ON THE MERITS.

To the extent that section 1988 is ambiguous, this Court has construed the statute to advance its underlying objective of providing incentives to counsel to bring meritorious civil rights actions. *See, e.g., Kay v. Ehrler*, 499 U.S. 432, 436-38 (1991); *City of Riverside v. Rivera*, 477 U.S. 561, 577-78 (1986) (plurality opinion). *See also, e.g.*, S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5909-10; H.R. Rep. No. 94-1558, at 1 (1976). "Persons who bring meritorious civil rights claims, in this light, serve as 'private attorneys general.'" *Buckhannon*, 532 U.S. at 635-36 (Ginsburg, J., dissenting) (quoting S. Rep. No. 94-1011, at 5 (1976)). Thus, section 1988 should be construed in light of "[t]he statutory policy of furthering the successful prosecution of meritorious claims . . . ." *Kay*, 499 U.S. at 438.

It follows that section 1988 should not be construed to authorize attorney's fee awards that have the effect of encouraging plaintiffs and their counsel to file non-meritorious actions. In *City of Burlington v. Dague*, 505 U.S. 557 (1992), for example, the Court held that fee awards should not be enhanced when a plaintiff prevails on a particularly risky claim because the result of such an approach "would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." *Id.* at 563. *Accord Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 724-27 (1987) (plurality opinion).[18]

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[18] In *Dague*, the Court elaborated:

> Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is

The statutory objective would be similarly undermined by a rule that permitted plaintiffs who bring non-meritorious claims to recover attorney's fees because they were able to convince a judge to issue preliminary relief in a case that ultimately proves to be meritless. Under such a rule, the potential for an attorney's fee recovery would afford counsel an incentive to sue based not solely on the relative legal merit of a claim, but also in light of the probability that counsel could obtain preliminary relief under the more liberal standard governing interlocutory injunctions. Moreover, if a preliminary injunction issues, the potential liability for attorney's fees would become potent leverage to induce settlement beyond the relative merit of the plaintiff's claim. Section 1988 should not be construed to create such skewed outcomes.

This case illustrates the point. Respondents' suit was utterly without merit. The constitutionality of a generally applicable ban on public nudity that promotes the legitimate government interest in protecting unwilling audiences from exposure to nudity is well settled, at least when applied without reference to the content of any nudist's speech or expression. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-72

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four times more likely to be paid. But with a contingency enhancement, this preference will disappear; the enhancement for a 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the "reasonable fees" provisions.

505 U.S. at 563.

(1991) (plurality opinion); *id.* at 573-79 (Scalia, J., concurring in the judgment); *id.* at 590-91 (White, J., dissenting).[19]

To be sure, perhaps use of a cloth screen might be a less restrictive alternative to a complete ban on nude performances, but this Court has explained that "when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the regulation because some alternative is marginally less intrusive on a speaker's First Amendment interests." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 217-18 (1997). Instead, a challenged policy should be upheld "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985) (ellipsis in original)).

This test is easily satisfied here; the problem with a cloth screen is that park resources must be diverted to police its use—a problem that was apparent given Wyner's unwillingness on at least two prior occasions to utilize a screen despite having agreed to do so. The fact that park management had previously permitted Wyner to perform in the nude behind a screen did not constitutionally preclude park officials from ending that forbearance, especially in light of its demonstrated inefficacy. In *Rock Against Racism*, for example, municipal officials had previously permitted rock concerts in Central Park without regulating the music's amplification, but that posed no obstacle to enforcement of a new

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[19] Although the issue is infrequently litigated, presumably because the pertinent First Amendment principles are so clear, the lower courts have consistently upheld generally applicable anti-nudity laws against First Amendment attack when applied to persons who appear in public where they may be seen by unwilling viewers. *See, e.g., Egolf v. Witmer*, 421 F. Supp. 2d 858, 871-73 (E.D. Pa. 2006); *Craft v. Hodel*, 683 F. Supp. 289, 292-99 (D. Mass. 1988); *Eckl v. Davis*, 124 Cal. Rptr. 685, 693-95 (Cal. Ct. App. 1975).

regulation promulgated in light of past complaints about the volume of music. *See* 491 U.S. at 784-88, 800-03. *Cf. Thomas v. Chicago Park District*, 534 U.S. 316, 323-25 (2002) (ordinance permitting park district to waive permit requirements was not invalid because officials had discretion to forebear enforcement).

Respondents' challenge to the park's time, place, and manner regulation was no better. The authority of parks to enforce regulations governing the time, place, and manner of expressive activities on a content-neutral basis is well settled. *See, e.g., Thomas*, 534 U.S. at 323-25; *Rock Against Racism*, 491 U.S. at 794-96; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-95 (1984). Although respondents argued at the injunction hearing that the regulation granted unfettered discretion to the park's management and effectively permitted content-based regulation of speech, J.A. 78-83, the district court declined to credit this allegation when granting the preliminary injunction. *See* Pet App. 16a-17a.

Even worse, the allegation proved to be without substance. In a facial challenge to a regulation under the First Amendment, a court must consider evidence of the manner in which a challenged regulation has been interpreted and administered to determine if it confers effectively unfettered discretion or facilitates content or viewpoint discrimination. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *Rock Against Racism*, 491 U.S. at 795-97. Yet, at both the preliminary injunction and summary judgment stages of this litigation, there was no evidence that the challenged regulation had been interpreted or administered to confer unfettered discretion on park management, or that it had been utilized in a fashion that facilitated content or viewpoint discrimination. To the contrary, the evidence showed only that petitioners had previously agreed to forebear enforcement of a perfectly valid anti-nudity regu-

lation based upon Wyner's agreement to utilize a screen—an agreement that she twice failed to honor.

Respondents' First Amendment claim, in short, was adjudged to be without merit. Indeed, respondents never appealed from the district court's judgment against them on the merits; the question whether respondents' First Amendment rights were violated by the challenged regulations is no longer an open one in this litigation. Under the holding below, however, respondents' counsel will receive almost $ 26,000.

Amici fully accept the obligation of state and local governments and officials to pay attorney's fees when they violate a plaintiff's civil rights. Yet under the holding below, petitioners must divert scarce public resources to pay attorney's fees to a party whose civil rights were never infringed. *Amici* represent thousands of local governments and officials charged with safeguarding the taxpayers' funds, and utilizing those scarce resources to fund a variety of important public services. We can see no justification for diverting these scarce tax dollars to the payment of attorney's fees of plaintiffs who lose on the merits. The idea that Congress could have intended to create attorney's fee liability for cases in which there has been no violation of the plaintiff's civil right is, in a word, bizarre.

Requiring section 1983 defendants who have committed no legal wrong to pay attorney's fees is not the only anomaly engendered by the holding below. It will also create unnecessary litigation at the preliminary injunction stage. Because state and local governments are institutional litigants that often appear before the same judges, they frequently attempt to work out temporary accommodations at the preliminary injunction stage in order to spare the district courts the burden of deciding difficult legal questions in an expedited fashion. And because state and local governments are entrusted with husbanding tax dollars, they also try to avoid incurring large

expenses in order to mount expedited defenses of applications for preliminary injunctive relief. If the holding below stands, however, state and local governments and their officials will have no choice but to mount full scale defenses of motions for preliminary injunctive relief in order to avoid subsequent liability for attorney's fees even when, as here, they prevail on the merits of the litigation. Conversely, under the holding below, if a plaintiff obtains preliminary relief, that fact alone will put enormous pressure on state and local governments to settled otherwise meritless litigation because the preliminary victory will itself be sufficient to establish liability for attorney's fees.

The incentive of counsel to act as private attorneys general on behalf of civil rights is fully protected by the availability of attorney's fees to those who prevail on the merits. Neither the text nor the purpose of section 1988, however, supports a rule that would award fees on meritless claims because a district court, in the infancy of litigation and under the liberal standard for preliminary relief, mistakenly assesses the plaintiff's likelihood of success on the merits. Congress cannot have intended to require the taxpayers to subsidize such litigation. The holding below is utterly at odds with the salutary purposes of section 1988.

CONCLUSION

The judgment of the court of appeals should be reversed.

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